No. 12,722

United States Court of Appeals
For the Ninth Circuit

California Motor Transport Co., Ltd. (a corporation), et al.,
Appellants,

vs.

The Fidelity and Casualty Company of New York (a corporation),
Appellee.

BRIEF OF APPELLEE THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

Hadsell, Murman & Bishop,
Sydney P. Murman,
614 The San Francisco Bank Building,
405 Montgomery Street, San Francisco 4, California,
Attorneys for Appellee The Fidelity and Casualty Company of New York.

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STATEMENT OF THE CASE.

This is a suit on contract involving two insurance policies. Appellants were insured from September 1, 1946, to January 21, 1947. Appellee insurance company contends appellants must pay for this insurance at the rate of $2.20 per $100.00 gross earnings as provided in the two new policies. Appellants contend that they have paid at the rate of $1.223 as provided in a binder because the binder extended the old policy, that expired September 1, 1946. Because appellee believes that the record shows that on the facts there can be no merit to appellants' contentions, and the trial

Court so held, a succinct chronological statement of all the facts should be helpful.

Commencing on September 1, 1941, and continuing on each anniversary date thereafter, appellee insured appellants for more than five consecutive years. From the beginning it was understood that the premium rate depended upon appellants' loss experience. Appellee and appellants' agent, Mr. Cantlen, discussed the premium rate with each renewal and, although the risk was developing adversely, the original premium rate of $1.223 per $100.00 of gross earnings remained unchanged until the renewal date in 1946. By that time the risk had risen above the permissible loss ratio to 185% of the earned premiums and appellants were notified that a 75% premium increase was in order. To protect appellants pending the writing of the new insurance, appellee issued appellants a sixty (60) day binder effective September 1, 1946, the expiration date of the old insurance. At the same time, and at appellants' agent's request, appellee made the required legal filings for appellants with the Railroad Commission and I. C. C. stating appellants were covered with the new primary policy No. SPL 20968, so that they could continue their motor transport business uninterrupted.

In the latter part of September, 1946, appellee wrote up and delivered to the agent the two new policies, effective from September 1, 1946, which, accordingly, superseded the binder. The agent knew that the new insurance, evidenced by both the primary policy SPL 20968 and the excess policy SPL 20950, together called

for payment of a total premium at the rate of $2.20 per $100.00 of gross earnings subject to final premium audit. At the same time, a proposed retrospective agreement which, even if signed, had no effect on the insurance except as to the rate applicable to the final premium audit of the primary policy at the end of the policy period, was delivered to appellants with the option of signing the same or subjecting the new policies to cancellation should appellee elect so to do. In December, 1946, appellee learned that appellants had definitely decided not to sign the proposed agreement, so appellee elected to give appellants the usual thirty (30) day notices of cancellation, which specifically referred by number to the primary and excess policies which had been issued effective September 1, 1946. Appellee also gave the Railroad Commission and the I. C. C. notices of cancellation specifically referring to the primary policy by number. All the cancellations became effective January 21, 1947.

Immediately upon receiving notices of cancellation and because their agent had tried in vain to place the insurance elsewhere, appellants on their own procured insurance at a "few cents higher" rate through a reciprocal organization of truckers known as the "Transport Insurance Exchange". Following cancellation, appellee completed a final audit of appellants' gross earnings in April, 1947. The audit, covering the period of September 1, 1946, to January 21, 1947, was certified correct by Mr. Davis, appellants' general auditor and assistant secretary. On the final audit as so certified, appeared the number of primary policy

SPL 20968 as well as a notation that appellants had not executed the proposed retrospective agreement so that the effective premium rates were $2.20 per $100.00 of gross earnings. Following the final audit, appellee rendered a "bill" to appellants, in the form of statements of adjusted premiums, showing that appellants owed a total earned premium of $16,973.11 on both policies which, less payments of $9,131.12 previously made to appellee by appellants on monthly reports voluntarily furnished by appellants after notices of cancellation were received, left a total premium balance of $7,841.99 due appellee. On October 22, 1947, appellants refused to pay the premium balance of $7,841.99.

In addition, and from and after September 1, 1946, the effective date of the policies, appellants reported a total of ninety-eight claims to appellee for handling under the two policies which appellee had issued. The record shows that appellants benefited by appellee paying out a total of $7,800.00 in disposing of these ninety-eight claims. The $7,800.00 paid out to dispose of these claims, together with additional acquisition costs of 13% of the earned premium plus production costs of 11%, clearly resulted in appellants continuing to be an unprofitable risk for appellee over and above the payments of $9,131.12 voluntarily made.

Furthermore, after appellants, with full knowledge of appellee's claim, had refused on October 22, 1947, to pay appellee's claim of $7,841.99 for the balance due on earned premiums as determined by final audit, appellants in December of 1947, referred a new claim

in the form of a lawsuit for $25,000.00 damages to appellee to defend on behalf of appellants under policies SPL 20968 and SPL 20950. In good faith, and at a cost to appellee in excess of $1,600 (included in the $7,800.00 paid out on claims), appellee undertook a successful defense of this lawsuit under the very policies the premium rate of which appellants are now again disputing in refusing to pay the premium balance of $7,841.99 due appellee since January 21, 1947.

After a full hearing lasting several days, the trial Court determined all conflicts and ruled for appellee, ordering judgment to be entered accordingly upon appropriate findings of fact and conclusions of law. Judgment was thereafter entered in appellee's favor for $7,841.99, plus interest from October 27, 1947, and costs of $49.70. The appeal has been taken from this judgment.

APPELLANT CONTENDS EVIDENCE INSUFFICIENT TO SUPPORT JUDGMENT IN FAVOR OF APPELLEE.

Appellants concede that Mr. Cantlen was "their agent" and that "It is undisputed that defendants were covered by insurance by plaintiff from September 1, 1946, until January 21, 1947". (A.O.B. 3, 9.) But, say appellants, "The question is whether or not the two policies sued upon in this action were in effect" since "Plaintiff contends that from September 1, 1946, until January 21, 1947, these new contracts of insurance were in effect" (A.O.B. 9-10). Thus "Appellants are urging, with the utmost seriousness,

that the finding of the trial Court that the policies sued upon were in effect from September 1, 1946, to January 21, 1947, is not supported by the evidence" (A.O.B., 11).

Appellants admit "being well aware of the rule that a judgment will not be disturbed if supported by substantial evidence". (A.O.B., 11.) However, after quoting some favorable fragmentary excerpts from the record, appellant conclude, "How and when could these policies have become effective? Certainly, the trial Court does not indicate how or when this occurred and the record is barren of anything that supports the conclusion that it did occur". (A.O.B., 50.) Nothing could be further from the facts as we shall show!

THE EVIDENCE IS MORE THAN SUFFICIENT.

Since it is undisputed that appellee covered appellants with insurance, there is no issue as to the existence of the contract between the parties. The issue is whether appellants should pay appellee a final audit premium balance of $7,841.99 computed at the rate of $2.20 per $100.00 of appellants' gross earnings in the manner set forth in two new insurance policies which were effective from September 1, 1946, to January 21, 1947, or whether, having voluntarily paid appellee $9,131.12 computed at a rate of $1.223 per $100.00 as set forth in an old policy which had expired September 1, 1946, appellants owe nothing more to appellee. Appellee contends that on the record the

balance due should be paid and the trial Court so held, resolving any conflicts in appellee's favor.

On this issue, the evidence is more than sufficient to show that the broker, Mr. Cantlen, first of Spengler & Johnstone and later of Bayly, Martin & Fay, as appellants' agent and broker, had been handling appellants' insurance account since 1930, when Mr. Coughlin, a man of forty years experience in the "mover transport business", took over control of appellants (R., 227, 306, 400). By 1941, an insurance company then covering appellants "was going to insist on an increase in premium" so Mr. Coughlin asked Mr. Cantlen to interest another company if possible (R. 301-302.) Mr. Cantlen interested appellee who agreed to insure appellants on the condition that the rate could be adjusted annually, depending upon the loss experience, as Mr. Cantlen testified (R. 303-304):

> "Q. And what was the offer, if I may call it that, of Fidelity & Casualty Company, at that time, in regard to carrying Coughlin's risk?
>
> A. As I remember, they offered to write the primary at rates of one per cent—one per cent per $100.00 of gross receipts. I talked with J. L. Culpepper, who is an agency supervisor for Fidelity & Casualty Company, and he agreed to assume the primary of five and ten thousand, property damage of five thousand, at a rate of one per cent, *with the understanding that we would start out at that rating, and from there on the risk would more or less make its own rate, dependent upon the experience.*
>
> * * * * * * *

Q. You have already stated you told him what the proposal was. What did you say to Coughlin?

A. I told him that the Fidelity & Casualty Company was willing to resume the risk at a rate of one per cent for the primary, and that they would go along with the risk and *adjust the rate annually, dependent on the loss experience,* and we could place the excess at the underwriters at Lloyd's, which would give him a combined rate guaranteed cost of, for that year, of 1.21.

Q. Were policies issued by the F. & C. at that rate *and under that understanding?*

A. *Yes, they were.*" (Emphasis ours.)

Successively each year thereafter, with that understanding appellants renewed their insurance with appellee. (R. 73-74, 228.) The original rate of $1.223 per $100.00 of gross earnings remained unchanged until 1946, although the loss experience gradually became more and more unfavorable. (R. 77, 269, 307-311.) Premium rates were constantly discussed by the parties in light of the mounting unfavorable loss experience. Mr. Mettalia, Casualty Superintendent of appellee, testified (R. 76-77):

"Q. What did Mr. Cantlen say to you at that time and what did you say to him as broker? You don't have to give the exact words, but the substance of the conversation.

A. *Well, we reviewed the losses and it indicated a loss ratio much, very much in excess of what we call a permissible loss ratio. Under the conditions, we needed more money to carry on the following year.*

Q. Did you say that to Mr. Cantlen?

A. Yes, I did.
Q. What did he say?
A. *He had agreed with me that it was definitely developing such a loss ratio that the premium should be increased at renewal."* (Emphasis ours.)

On April 18, 1946, appellee wrote appellants' broker that appellants' account was "costing us money which will be reflected in the premiums". (R. 230-231.) Appellants' broker called this to appellants' attention. (Pl.'s Ex. 15; R. 230.) By July, 1946, losses had risen above the "permissible loss ratio" to 185% during the first half of the 1945-1946 policy year. (Third Party Defendant's Ex. BB; R. 134.) In other words, apart from additional production and acquisition costs, the total premium income since 1941 had been about $66,000.00, with total losses from 1941, running appellee in the red at between $77,000.00 and $78,-000.00. (R. 83.)

Beginning in July, 1946, with a discussion of appellee's high exposure in the "Peralta Case" (R. 136, 320-321, 342-344, 365-366) and continuing thereafter, the appellants' broker had numerous talks with the parties as to the unfavorable loss experience which was causing an inevitable increase of about 75% in premium rates for renewal during the 1946-1947 policy period. (R. 74-77, 233-235, 260, 293-294, 319-322.) Appellants' broker agreed an increase was necessary and that, due to the loss experience, a rate of $2.20 per $100.00 gross earnings was reasonable. (R.

78.) In this connection, Mr. Mettalia testified (R. 82-84):

"Q. *What rates did you tell him you were proposing?*

A. *$2 for the primary coverage and 20 cents for the excess coverage.*

Q. *Is that $2 per $100 for gross receipts?*

A. *Yes.*

Q. *And 20 cents per $100 gross receipts for the excess?*

A. *That is correct.*

Q. *A total premium for its policies of $2.20 for $100 gross receipts?*

A. *That is correct.*

Q. *You stated that to Mr. Cantlen before the expiration date of SPL-1457?*

A. *That is correct.*

* * * * * * *

What did Mr. Cantlen say when you gave him those figures?

A. Oh,——

Q. Well, I don't mean exactly. What, in substance, was his reply?

A. *That the rate was reasonable because of the past experience and other conditions that arose in the industry as a whole.*

* * * * * * *

Q. Following that conversation, what, if anything, was done about the new policies?

A. *We finally agreed on the rates.* I submitted my formula to the National Bureau. The policies could not be issued until that approval was forthcoming, so that we had to issue a binder pending the approval of the Bureau, so we proceeded with the binder and *then when the Na-*

tional Bureau approved the rates, why, we went ahead and issued the policy." (Emphasis ours.)

On cross-examination, Mr. Mettalia testified as follows (R. 102-103):

"Q. Yes. Well, then, to restate that, *you had an agreement with Mr. Cantlen as to what the premium would be, which was $2.20, subject to the approval of the National Bureau?*

A. *That is correct.*

* * * * * * *

Q. I will ask you the question again: *After September 1, did you have any further negotiations with Mr. Cantlen as to what the rate would be during that succeeding year, September 1, 1946, to September 1, 1947?*

A. *No.*" (Emphasis ours.)

As far as appellee was concerned, at no time did appellants instruct their broker not to renew the insurance which appellee was willing to issue at the $2.20 rate. (R. 139-140, 238, 261.) Furthermore, appellants knew that as of January 1, 1946, there had been a general nationwide insurance rate increase of 33%. (R. 128, 292-293.) They also knew that the rate negotiations ceased when the rates were referred to the National Bureau for approval and, when once approved (Pl.'s Ex. 1; R. 80), the rates couldn't be changed without further Bureau approval (R. 147-148.) On re-direct examination, Mr. Mettalia testified as follows (R. 143):

"Q. Oh, yes, but between the date you and Mr. Cantlen talked, the time that the bureau approved, and the time that the policies, Plaintiff's

Exhibits 3 and 4, were written up there was no change?

A. No.

Q. If there was any conversation about this rate, so far as your mentioning the standard rate, that came afterwards?

A. Yes. We would not have any authority to deliver that—we could deliver it, *but wouldn't have any authority to use any other rate other than what we used in this.*

Q. *Which the Bureau approved?*

A. That is correct." (Emphasis ours.)

Lastly, they knew that when the expiring 1945-1946 policy (Defendants' Exhibit A; R. 101) actually expired on September 1, 1946, the needed filings on defendants' behalf with the Railroad Commission and the I.C.C. expired with it unless new insurance was issued. On direct examination of Mr. Cantlen, he testified (R. 240):

"Q. What, if anything, was said about the filings?

A. And that they would file so that there would be no lapse of coverage.

Q. You knew at that time, did you not, that in order to file with the ICC and the Railroad Commission there had to be a policy number filed?

A. That is right."

So when appellee at appellants' request issued a binder to appellant (Defendants' Exhibit B; R. 106), pending the writing of policies SPL 20968 and SPL 20950 to take the place of old policy which expired on September 1, 1946, appellee again at appellants' broker's request and with his knowledge filed the

necessary insurance coverage of the primary policy SPL 20968 for appellant with the Railroad Commission (Plaintiff's Exhibit 2; R. 86) and I.C.C., all before September 1, 1946, so that appellants could continue on uninterrupted after September 1, 1946, with their motor transport business (R. 84-87, 111-113, 264, 269, 299, 328, 348, 382-383.) Thus from and after September 1, 1946, the new policies were in existence but not yet actually written up. Mr. Cantlen so testified on cross-examination (R. 299):

"Q. Well, the binder was issued on August 27, 1946, wasn't it?

A. Yes.

Q. The notification was given to the Interstate Commerce Commission and the Railroad Commission prior to August 27th, 1946, pertaining to coverage of the California Motor Transport Company?

A. Correct.

Q. In those notices, the Railroad Commission and Interstate Commerce Commission, prior to August 27th, 1946, the notification stated that the coverage was reflected by Policies 20950 and 20968.

Mr. Murman. I think just 20968.

Q. (by Mr. Eisner). All right; 20968, is that it?

A. Yes.

Q. At that time, no policy 20968 was in existence?

A. *Well, it was in existence but not written.*" (Emphasis ours.)

The filings were reported by appellants' broker to appellants when he delivered the binder to Mr. Cough-

lin who later confessed knowing, although he didn't read the binder, that "the binder gives you coverage until a policy is issued". Mr. Cantlen testified on direct examination (R. 241-242):

"Q. Where did you deliver the binder to him?

A. At his office.

* * * * * * *

Q. *Did* you *tell him about the company taking care of the filings that we have mentioned?*

A. *To my best recollection, I did.*

Q. You did? And what did he say as to that?

A. There was no particular comment. It was the customary procedure." (Emphasis ours.)

As to the binder itself, Mr. Coughlin testified on cross-examination (R. 347):

"Q. Do you know what a binder is?

A. Well, I do and I don't, I suppose.

Q. In any event, you did not read that document which you have in your hand?

A. *I did not, but I do know a binder gives you coverage until a policy is issued."* (Emphasis ours.)

Also, as soon as appellee made the necessary filings so that appellants could continue to operate, appellee had every right to believe and did believe that appellants had accepted the new insurance. On cross-examination Mr. Mettalia testified (R. 119):

"Q. Did Mr. Cantlen accept these policies without the signing or execution of the retrospective agreement?

A. *Not only did Mr. Cantlen accept them, but the insured accepted them.*

Q. *Why do you say the insured accepted them?*

A. *Because there is an ICC and Railroad Commission filing. If he didn't accept them, he couldn't operate* and the ICC and Railroad Commission file would have immediately pulled him off the road." (Emphasis ours.)

Thereafter the insurance contract between the parties was always referred to or identified by the new policy numbers, SPL 20968 and SPL 20950. At the end of his cross-examination, Mr. Cantlen testified (R. 299-300):

"Q. After August 27th, 1946, whenever the coverage by Fidelity & Casualty Company of California Motor Transport Company was referred to in any communications between your office and Fidelity & Casualty Company or Fidelity & Casualty Company and your office, was that coverage referred to or identified in the same manner as Policy 20968?

A. My recollection, it was.

Q. It was so referred to?

A. Yes.

Mr. Eisner. That is all."

The new policies (Plaintiff's Exhibits 3 and 4; R. 88-89) replacing the binder, were issued for one year from September 1, 1946, and, as written, were delivered the latter part of September to appellants' broker with a proposed retrospective agreement, their broker telling Mr. Coughlin that appellee "insisted upon the declaration of the policies" (R. 88-91, 106-107, 140, 266, 290.) On direct examination Mr. Cantlen testified (R. 244):

"Q. When did you say the declaration of the policies, what do you mean by that? I mean, that is a little unusual phrase.

A. Well, in the business, you might carry the business under a binder, and the declaration of *the policy is declared on writing of the actual contracts.*

Q. The writing of the actual contract is in the paragraph here where binders is referred to, is that correct, in reference to the policies being issued, *they would supercede the binders?*

A. *That is right.*" (Emphasis ours.)

Not before then had appellee required appellants to sign the retrospective agreement, although it clearly was not a condition to the insurance becoming effective since, if signed, it only applied to the final audit premium rate appellants were to pay appellee at the end of the policy period. On cross-examination Mr. Mettalia testified (R. 107, 118-119):

"Q. And you requested that the insured sign this retrospective agreement as a condition to the policies becoming effective, did you not?

A. No, absolutely not.

* * * * * * *

Q. No, do you mean to say, then, that these policies were in effect without the signing of this retrospective agreement?

A. Absolutely, yes, sir.

Q. Did you so tell Mr. Cantlen?

A. Yes."

It must be noted in passing that with conspicuous and continuous lack of success, appellants' broker, at their insistence, tried in vain throughout the time in

question to interest many other old line insurance companies in insuring appellants but the broker was unable to find a single company "that would take the risk at a more attractive basis than the Fidelity and Casualty were offering" (R. 237, 242-245, 325-328, 333.) Despite that and in accordance with appellee's understanding, appellants' broker himself testified that "negotiations closed with the Fidelity and Casualty as of September 24, the issuance of the policies". In this connection, Mr. Cantlen testified on cross-examination (R. 266):

> "Q. Did you say anything to Mr. Mettalia or Mr. O'Malley, or anyone else connected with the Fidelity pertaining to an extension of time on the binder?
>
> A. No.
>
> Q. Why not?
>
> A. *Because the binder was replaced by policies as issued.*
>
> * * * * * * *
>
> Q. Your negotiations for renewal, you say, extended over the sixty-day period?
>
> A. Well, they were still—now, the *negotiations closed with the Fidelity & Casualty as of September 24th, the issuance of the policy.*" (Emphasis ours.)

Thus the proposed retrospective agreement which, if signed, would have had no effect on the issuance of insurance, affecting only the applicable rate on the final premium audit of the primary policy SPL 20968, was left by appellants' broker with Mr. Coughlin "to look them over" (R. 244, 327.) As a matter of fact, Mr. Coughlin, as in the case of the binder that was

given him to read and later on the letters and policies themselves, confessed that he "never read it all the time it was in my office" although he was the one and only person who made the decisions as to the appellants' insurance. In this connection, Mr. Coughlin testified (R. 400, 409, 355):

"Q. Mr. Coughlin, you are president of the California Motor Transport Company?

A. I am.

Q. How long have you been president of that company?

A. Since 1930.

Q. How many years' experience have you had in the mover transport business?

A. About 40 years.

Q. Do you personally handle the insurance coverage by the California Motor Transport Company and its affiliates?

A. I do.

* * * * * * *

Q. But at that time you did know about the $2.20 rate?

A. *No, I didn't look at the policy.* The policy was delivered to us on that particular date. I didn't look at it.

Q. Did you know about the letter Mr. Davis wrote in answer to the Cantlen letter transmitting the policy?

A. Yes, I did. I saw that letter, the letter to Bailey, Martin & Fay, and Mr. Cantlen told me what it called for, and I said, 'I have no objection'. He asked me if I would object to Mr. Davis writing it and I said no.

Q. *Did you subsequently read it over after it was written?*

A. *No sir, I had left.*

Q. Did you ever look at it after it was written?

A. No.

Q. You don't know today what is in it except what you may look at it now, is that right?

A. That is right.

* * * * * * *

Q. Now, Mr. Coughlin, I call your attention to the first page of that document (the retrospective agreement) that was handed you at the time, and observe that it refers to a particular policy number SPL 20968. Did you observe that at the time?

A. No, sir, never observed at any time. In fact, *I never read it all the time it was in my office.*" (Insertion and emphasis ours.)

Appellants' broker, who had accepted the policies from appellee and who had seen the $2.20 rate specified therein, retained possession of the policies for appellants, so informing the appellants who, in turn, knew that insurance from and after September 1, 1946, was absolutely necessary (Third Party Defendant's Exhibit PP; R. 330) in order to carry on their transport business without interruption (R. 118, 253, 272, 294.) In this connection, Mr. Coughlin testified (R. 348, 349-350):

"Q. *Do I understand it is necessary in your business for you to have insurance, that is, necessary by reason of the rules of the ICC and Public Utilities Commission?*

A. *Yes.*

Q. *And also, I assume, without insurance, you risk catastrophe,* that is accidents. You were aware of that risk, I assume?

A. *Yes, indeed,* but we had no trouble placing insurance.

* * * * * * *

Q. *Are you familiar with the fact that certain of the customers or clients, or whatever you call them, that you serve, require certificates showing you are insured?* You are familiar with that fact, are you?

A. *Yes, I am.*

Q. I hand you Third Party Defendants' Exhibit PP, letter November 18, 1946, with reference to the American Manganese Steel Division, certificate of insurance. You observe that is a letter to the American Manganese Steel Division?

A. Yes.

Q. Attached to it is a letter from you.

The Court. That is Exhibit what?

Mr. St. Clair. Exhibit PP, Your Honor.

A. Yes.

Q. I will refer you to the letter, a carbon of which went to the California Motor Transport Company, Ltd., and call your attention to the fact that the statement in there is that your insurance expired September 1st, 1947. Do you see that statement in the letter?

A. Yes, I do. I didn't receive this letter.

Q. Did anyone in your organization?

A. I suppose Mr. Davis did. I didn't receive it.

Q. Did Mr. Davis call this letter to your attention?

A. Not that I recall.

Q. Was it your routine in details of insurance, is Mr. Davis the man that would do that insurance business?

A. Majority, yes.

Q. Though you had handled the broad company policy?

A. Yes.

Q. Mr. Davis didn't call your attention to this remark that your insurance ran out September 1st, 1947?

A. Not to my knowledge, no." (Emphasis ours.)

As to the American Manganese letter, Mr. Davis, appellants' general auditor and assistant secretary, testified (R. 378):

"Q. Now, I want to show you this Exhibit 'PP', which has been shown to Mr. Coughlin here. Here it is.

The Court. That is the Manganese letter, written in July, 1946, I think.

Mr. St. Clair. November of 1946, Your Honor.

Q. (by Mr. Eisner). Now, Mr. Davis, did you handle this correspondence pertaining to this American Manganese Company?

A. Yes, sir.

Q. *Well, do requests frequently come from customers or shippers to receive corroboration of your insurance coverage?*

A. *Yes, I get any number of them over a period of a year.*

Q. What is your practice with reference to them? What do you do with them?

A. I write a letter to the firm giving the inquiry relative to our insurance. I mean, *I write a letter to our insurance broker transmitting the letter from the shipper or consignee and asking that they favor the firm with a letter direct, answering the inquiry,* and letting me have a copy

for my file so that I know that it was attended to." (Emphasis ours.)

Following appellee's request that appellants sign the proposed retrospective agreement (Third Party Defendants' Exhibit QQ; R. 331), their broker advised appellee that appellants refused to sign the same (R. 108-109, 332-333.) So appellee elected to cancel the insurance. (Third Party Defendant's Exhibit RR; Plaintiff's Exhibits 5-8; R. 93-95, 332.) But it was not cancelled at appellants' request nor solely because appellants refused to sign the proposed retrospective agreement (R. 109.) Appellants had also refused to renew certain fidelity bonds as originally agreed upon (Plaintiff's Exhibit 8; Third Party Defendant's Exhibit RR; R. 95, 332) when appellee had renewed the insurance, on a rate based on an over-all volume of business with the appellants which included the fidelity bonds, with the hope that appellee could "get out of the red" that way on appellants' unfavorable loss experience. On cross-examination Mr. Mettalia testified (R. 110):

"Q. As I understand it, then, the meaning of that language is that the Fidelity and Casualty Company had hoped to receive the bond business from the insured, is that right?

A. In other words, we had hoped to get out of the red. We had lost.

Q. *Did the fact that you did not receive the bond business have anything to do with the cancellation?*

A. *Yes, partly.*" (Emphasis ours.)

Thus the insurance was cancelled for more than one good reason (R. 110-111.) So, not being able to interest any other company, appellants entered into a reciprocal agreement (Third Party Defendant's Exhibits SS-1, 2, 3 and 4; R. 358-359) with the Transport Insurance Exchange, calling for a retrospective type of premium at a rate "a few cents higher" to be effective as of January 21, 1947, the date of cancellation of appellee's two policies (R. 335, 361-365, 407.) On December 19, 1946, appellants' broker received copies of appellee's cancellation notices which, as stated before, were effective January 21, 1947 (Plaintiff's Exhibits 5 and 6; R. 93.) Appellants' broker discussed with appellants the implications of the cancellation notices. On direct examination Mr. Mettalia testified (R. 92):

"Q. Are you referring to the beginning of the period or the end of the period?

A. Both. I mean, the policy was effective September 1, 1946, and expired September 1, 1947.

Q. Would there be any way that that policy, that policy period would be shortened?

A. Only by a cancellation notice or by endorsement, which must be acknowledged by the insured. That is the only two ways I know of, or if the policy is returned for cancellation.

Q. Were either of those two ways followed in this particular case?

A. Yes.

Q. Which of the two?

A. We sent out cancellation notices."

In this connection, Mr. Cantlen testified on direct examination (R. 253):

> "Q. Now, Mr. Cantlen, did you receive a cancellation notice that the company sent out in connection with these policies?
>
> A. We received a copy of it.
>
> Q. You received a copy? Did you deliver the copy to the assured or discuss the copy with the assured at all?
>
> A. Yes, after they were served, we discussed it, and there was thirty days for it to become effective."

Undoubtedly appellants were aware that notices of cancellation were also filed by appellee with the Railroad Commission and the I.C.C., also effective on January 21, 1947 (Plaintiff's Exhibits 7 and 8; R. 94-95.) It should be noted in passing that the parties understood that no cancellation notice of the binder had been necessary since it had been superceded by the policies which were issued effective September 1, 1946 (R. 114, 346-347.)

At various stages during the trial of the case, appellants' attorney attempted to make something of the fact that the deposit premiums set forth in the policies were never paid by appellants. The record shows that the cancellation notices were issued by appellee and received by appellants before the delinquent deposit premiums were actually in default so as to permit appellee to enforce collection and, furthermore, the cancellation notices were received before appellants' broker had remitted to appellee any of the

premium payments due to appellee from appellants as called for by the monthly report or voluntary audits, subsequently submittted to appellee by appellants' broker. Mr. Rechnagel, appellee's cashier, testified on cross-examination (R. 208):

"Q. Then I ask you, so far as the deposit premium that was referred to is concerned, so far as your department is concerned, that wasn't yet in default, is that correct, that is, in December?

A. That is right.

Q. *At the time you knew the policy was canceled, then and under your practice, that premium was not in default?*

A. That is right."

On re-direct examination, Mr. Rechnagel testified (R. 212):

"Q. You said that there were no deposit premiums collected. I believe you said that in answer to one of Mr. Eisner's questions?

A. That is right.

Q. Also, in answer to Mr. St. Clair's question you said that cancellation notices had been sent out December 17, 1946?

A. I think that was the date, yes, sir.

Q. *The deposit premiums were not in default on that date?*

A. *That is correct.*

Q. Does that explain why they were not collected?

A. So far as my records are concerned, yes."

On re-cross examination, Mr. Rechnagel testified (R. 214):

"A. Well, we expect our agents to pay us their premiums when they collect them. However, they do not become overdue for 60 to 90 days. When I say '60 to 90 days', I mean this: *The September item actually has to be marked off my books on December 31, either by payment or cancellation.*

Q. (by Mr. Eisner.) You recognize the propriety of the payee, the party to whom the payment has been made, to retain the money for that length of time.

A. Yes, sir."

On further re-direct examination, Mr. Rechnagel testified (R. 222):

"Q. So that in this case the premium, then, went on your books as a premium that was to be paid you on December 1, something that had to be paid between that date and December 31?

A. That is right.

Q. *It would only be after December 31 you would attempt collection measures, is that correct?*

A. *That is right.*

Q. *In the meantime the notice of cancellation went out?*

A. *That is right.*

Mr. Murman. I have no further questions." (Emphasis ours.)

Except for the deposit premiums, all remittances to appellee made by appellants were made after the policies were actually canceled on January 21, 1947, and one at least even after the final premium audit had been completed. In this connection, Mr. Cantlen testified on re-direct examination (R. 296-297):

"Q. The cancellation which took place, as evidenced by Plaintiff's Exhibits 5 and 6, that took place before any remittances by you to the company on the basis of these reports or voluntary audits, isn't that correct?

A. That is correct.

Q. And it was after the cancellation notices that you did make those remittances?

A. That is correct.

Q. And I believe some of them were made even after the date of the cancellation, isn't that correct?

A. Yes."

As to the monthly reports which appellee received from appellants' broker after the cancellation became effective, the evidence shows that each of such reports was sent in by appellants to their broker with appellants' covering checks as a routine procedure and generally about thirty days late (R. 250.) Each of these same reports was in turn broken down by appellants' broker and then forwarded by him to appellee (Plaintiff's Exhibit 10; R. 149), who receive them with appellants' broker's covering check, which as to all reports totalled $9,131.12, or the amounts which appellants admit paying to appellee (R. 163-166, 181-184, 203-206, 250-252.) Also, it should be noted that these reports were "sent in with specific reference to the new policies 20950 and 20968" during the time that appellants' broker had such policies in his possession with knowledge of the earned premium rate to be used on final audit in the amount of $2.20 for $100.00 of appellants' gross earnings, and that furthermore such reports so sent in were subject to the final

premium audit. Mr. Challburg, appellee's auditor, testified on direct examination (R. 150, 151, 152):

"Q. Did the audit statement you made up confirm these gross receipts reports as being correct?

A. Well, except that was a voluntary, subject to final audit."

* * * * * * *

"Q. I note, Mr. Challburg, that whereas there are five gross receipts reports, there are only four audit reports. Can you explain that?

A. The last one of the reports wasn't billed due to the fact that it is taken care of in the final audit."

* * * * * * *

"Q. (by Mr. Murman). Mr. Challburg, did you make a final audit in this particular case involving these defendants in connection with Policy No. SPL-20950 and SPL-20968?

A. I did."

In this connection, Mr. Cantlen testified on re-direct examination (R. 296):

"Q. Now, on these voluntary audits that you developed through processing the defendants' reports to you concerning gross earnings and premiums which they calculated had been earned on those gross earnings, *those voluntary audits were again sent in with specific reference to the policies 20950 and 20968, isn't that correct?*

A. *That is right.*

Q. *At that time you had the policies in your possession?*

A. *That is right.*

Q. You had examined and seen an endorsement in them regarding rates, isn't that correct?

A. That is right.

Q. *And you also knew, did you not, Mr. Cantlen, that these reports were subject to final audit, as you have stated?*

A. *Yes.*" (Emphasis ours.)

Appellee received all of these reports with the same understanding, namely, that all of them were subject to final premium audit. On cross-examination, Mr. Challburg testified (R. 167, 174-175):

"Q. Do you mean to say, Mr. Challburg, no one in your department, when the statement is received of gross receipts showing the rate of premium that is figured upon the gross receipts, checks the rate and premium to see whether it is correct?

A. Not until the final audit."

* * * * * * *

"A. They are checked, as I say, in the final audit.

Q. Special audit is made, we will say, months after the time these reports are received. Do you mean to say in the meantime there is no check made of them?

A. Not until final audit is made."

Consequently, appellee contends, and the trial court concurs, that by sending in the monthly reports to appellee who received them, they are in no way binding on appellee as to the actual balance due appellee on the earned premium which was to be determined only by the final premium audit actually made by appellee after the insurance terminated.

The final premium audit which was actually made by appellee was not peculiar to this case. Appellants'

broker testified that in all previous policies there were in each case final audits by appellee with a final adjustment of premium after the terms of each of the previous policies had expired (R. 78, 221-222.) This was the expected procedure (R. 298.) Furthermore, both of the policies, SPL 20968 and SPL 20950 (Plaintiff's Exhibits 3 and 4; R. 88-89), show on their face and clearly state in the conditions thereof that upon termination of the policies the earned premium shall be computed by final audit and in this connection appellee shall be permitted to inspect, examine and audit appellants' books insofar as they relate to the premium basis or the subject matter of the insurance in order that a proper premium adjustment may be made as soon as practicable after the time the cancellation becomes effective (R. 89.) The testimony shows that the final audit is made not only to develop the final earned premium as such, but also to correct any mistakes in the monthly reports or voluntary audits submitted by appellants as well as to pick up all exposures to risk entertained by appellants during the policy period in order to make the final audit premium correct in all respects. On cross-examination Mr. Mettalia testified (R. 105):

> "A. *A contract of this type,* as we had it before, *is a broad form liability policy,* and it is based on certain exposures that are developed at the time we issue the contract. When an auditor goes to make an audit, the meaning of that *audit is to pick up the payrolls, receipts, and any other exposures that the insured may have entertained during that period.* If I may explain further,

your Honor, by this I mean if he decides to buy a hotel, we pick up that exposure because he is automatically covered under the original contract. That is part of what the auditor does when he goes out to make that audit, and that is in the provisions of the contract.

Q. Then the purpose is, Mr. Mettalia, to ascertain what are the gross receipts from any source of the insured to which the premium should be applied at the rate specified in the policy, is that correct?

A. That is correct." (Emphasis ours.)

On cross-examination Mr. Rechnagel testified (R. 195, 213):

"Q. Your department then simply accepted the statement of the auditing department as correct?

A. That is right, because if there is any mistake that would be picked up by the final audit, you see."

* * * * * * *

"Q. Just a moment Mr. Rechnagel, do you mean to say that you wait until the final audit, which in this instance was in April of 1947, before a check is made to see whether or not the insured has reported his premium at the proper rate?

A. Yes."

The final premium audit (Plaintiff's Exhibit 12; R. 154) which appellee made covered both the policies which had been issued effective September 1, 1946, being made in April, 1947, at appellants' offices in the presence of their general auditor, Mr. Davis, who

certified to the same. Mr. Challburg, appellee's auditor, testified (R. 152-153, 154):

"Q. I show you, Mr. Challburg, what purports to be an audit made by you in response to a payroll audit requisition, and ask you to state whether or not those documents constitute the audit, the final audit made by you.

A. That is right.

Q. *And in whose presence, can you state, was the audit made?*

A. *Mr. Davis.*

Q. *As one of the California Motor Transport, he signed, did he, in your presence?*

A. *That is right.*

Q. His signature appears right on there?

A. Yes.

Q. There is a date on there of April 2, 1949?

A. That is right.

Q. Is that the date he signed?

A. That is the date the audit was made."

* * * * * * *

"The Court. Is that the one signed by Mr. Davis?

Mr. Murman. Yes, your Honor, the first sheet is signed by Mr. Challburg. The entire audit is signed by Mr. Davis covering both policies." (Emphasis ours.)

On direct examination, Mr. Davis, appellants' auditor testified (R. 375, 376-377):

"Q. Mr. Davis, I call your attention to the following words written upon the page of the Exhibit which bears your signature, 'Assured refused to sign retrospective agreements. Retro-

spective rates not to be used.' Were those words upon that Exhibit when you signed your approval or certified to the correctness of the audited figures?

Mr. Murman. I object to that on the ground it is an attempt to vary a written instrument."

* * * * * * *

"The Court. Overrule the objection, for the reason I have just stated.

Mr. Murman. Yes, Your Honor.

The Court. That came up on your direct case.

A. You asked me——

Q. (by Mr. Eisner.) If the writing which appears on that page that bears your signature and which I have just read to you was upon that page, according to your best recollection, at the time that signature was appended?

A. I couldn't say. I couldn't say if it was there or not.

Q. You have no recollection?

A. No.

Mr. Murman. That wasn't his testimony. He said he couldn't say. It isn't that he had no recollection, he said he couldn't say.

Mr. Eisner. I am asking him if he has any recollection.

The Court. I wrote down, 'I can't say whether it is there or not.'

Mr. Murman. That is exactly what he said.

The Court. That is what you said, isn't it?

A. That is what I said."

On cross-examination, Mr. Davis testified (R. 383-384):

"Q. Coming back to this Exhibit '10', Plaintiff's Exhibit '10', which was the final audit, you recall——

A. I recall the Exhibit.

Q. Mr. Eisner read you some language and you said you didn't recall whether it was on there at all at the time you signed. He didn't read this, and I will ask you whether this language was on there at the time you signed: 'Rates of 150-BI, 50-PD, rates of 15-BI, 05-PD, (given to me by underwriting department):' Was that on there at the time you signed it?

A. I couldn't say if it was or not.

Q. To the best of your recollection?

A. I just couldn't say. The only thing I would be interested in there was any difference in gross receipts.

Q. There is quite a space, Mr. Davis, from the top of the page where these audits as to gross receipts end, and the bottom where you signed. Don't you have any recollection as to whether there was writing in between there?

A. I don't know. Three years is a long time ago.

Q. Did you note at the bottom here whether 'California Motor Transport Company' was written opposite 'insured'?

A. No, I can't say that I noted that.

Q. How about policy numbers SPL-20950? Did you know whether that was on there?

A. No, I didn't. I don't recollect what was on there. I know when they come in it is a matter of determination of proper report and gross receipts during the period, and the policy number wouldn't mean anything, or anything else. If

there are any discrepancies in the amount between our report and the amount of final audit, the Auditor would call it to my attention. We have any number of them.

Q. *However, your signature is opposite the word 'Certified by——'.*

A. *William J. Davis.*" (Emphasis ours.)

In this connection, it should be noted that the audit stated on its face that the applicable rates for the insurance were $2.20, that "assured refused to sign retrospctive agreement—retrospective rates not to be used", that the final premium audit was made without reference to the unsigned proposed retrospective agreement and that based on the premium rates set forth in the policies, appellants owed a total premium balance to appellee of $7,841.99 (Plaintiff's Exhibit 14; R. 188), being the total premium balance due appellee on both policies (R. 154-156, 187-188.) Voluntary payments totaling $9,131.12 made to appellee by appellants' broker at appellants' request after the policies were cancelled and prior to appellants being billed (Plaintiff's Exhibit 14; R. 188), had nothing to do with the balance of the premium due appellee as shown by the final audit which was arrived at by subtracting the total voluntary payments of $9,131.12 from the total earned premium as developed by the final audit, or $16,973.11, leaving a balance due appellee of $7,841.99 (Plaintiff's Exhibit 15; R. 158, 211-212.)

"Bills" in the form of statements of adjusted premiums were sent to appellants' broker (Plaintiff's

Exhibit 13; R. 156-160, 210-211.) The premium rates were the same as those shown in the policies. The broker in turn made up his own bills which he subsequently delivered to appellants (R. 224-225.) Before doing that, and during discussions with appellee following the final premium audit, the broker was clearly told by appellee "that the company would not have issued the policies at a lower rate on a guaranteed basis, and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of $2.20" (R. 276, 336.) Thus the bills made up by appellants' broker were delivered to appellants with the policies in October, 1947, although the covering letter signed by appellants' broker (Plaintiff's Exhibit 17; R. 255) is dated August 7, 1947 and states that because the proposed retrospective agreement was not signed and entered into "it is not applicable" to the balance of $7,841.99 due appellee by appellants on the final audit premium (R. 256.) On the date of delivery to appellants, October 22, 1947, appellants, in writing, declined payment of the balance due appellee (Plaintiff's Exhibit 18; R. 257.) Thereupon appellee placed the balance due in "suspense" on November 7, 1947 (Plaintiff's Exhibit 14; R. 188), and through appellants' broker demanded full payment from appellants on November 12, 1947 (Plaintiff's Exhibit 19; R. 258.) When payment was not forthcoming from appellants the matter was referred to appellee's attorneys for collection (R. 226.)

Concurrently with the development of the facts as to the issuance of the insurance, the writing of the

policies, the rejection of the proposed retrospective agreement by appellant and the subsequent refusal of appellants to pay the balance due appellee on the final premium audit, numerous claims were filed with appellee by appellants under the two new policies for handling throughout this entire period and even after appellants' final refusal to pay the premium balance due appellee.

Appellants' broker testified that under the system of reporting claims which appellant and their broker had in effect, appellants reported their claims (Plaintiff's Exhibit 9; R. 99) directly to appellee for handling (R. 245-247.) Thus, on and after September 1, 1946, appellants reported ninety-eight claims to appellee for handling under the two new policies issued as of that date and appellee paid out about $7,800.00 of its own money in disposing of such claims (R. 96-99, 125-126, 381.) This sum of $7,800.00 which appellee paid out in servicing the insurance which it had issued to appellants was only one of three major business costs to appellee which appellee undertook in the handling of appellants' insurance risk, the other costs being production costs of 13% of the total premium income together with acquisition costs of 10% to 11%. In this connection Mr. Mettalia testified on re-direct examination (R. 142):

"Q. *So this $7800 is just one of three?*

A. *That is only attorney or legal expenses in connection with claims. In addition to that you have production cost, which averages about 13 to 14 per cent.*

Q. Of what?

A. *Of a dollar income. Then you have acquisition cost, which is based on about 11 per cent, 10 per cent.* I think in this case our production cost was about 13 per cent.

Q. *Of each dollar that the company took in?*

A. *That is correct.*" (Emphasis ours.)

In making reports to appellee, appellants used regular forms approved by the National Bureau with policy numbers appearing on the forms in some cases, although not always (R. 120-122.) In the case of one accident which occurred on October 26, 1946, (Plaintiff's Exhibit 16; R. 248), a complaint was actually served on the appellants who in turn forwarded it to their broker for transmittal to appellee for handling "under policies No. SPL 20968 and SPL 20950". During his direct examination Mr. Cantlen testified (R. 248):

"Q. I thought you said it had gone through your office?

A. I said we had knowledge of it because the complaint was served on the assured, which in turn forwarded it to us, to our office, and transmitted it to the insurance company.

Q. *It was transmitted by you to the insurance company under Policy No. SPL-20968 and SPL-20950, is that correct?*

A. *That is correct.*

Q. *Those are the policies in question in this case?*

A. *That is right.*" (Emphasis ours.)

This appellants' broker did because the broker expected appellee to handle appellants' claims under the two new policies which had been issued effective September 1, 1946, even though the proposed retrospective agreement bearing only on the final premium audit hadn't yet been signed by appellants. Mr. Cantlen testified on re-direct examination (R. 295-296):

> "Q. Now, I believe you testified, Mr. Cantlen, that during this period of time you referred to the company for handling a claim, which was identified as Plaintiff's Exhibit 16, referring specifically to the portion setting forth the rates that we have been talking about, *and you did that irrespective of the fact that the retrospective agreement had not yet been signed, isn't that correct?*
>
> A. *That is right.*
>
> Q. *In other words, you expected the company to handle this claim, even though it was claimed the defendants in this case hadn't signed the retrospective agreement, is that right?*
>
> A. *That is right.*
>
> Q. And that is one of the exhibits you said you had not yourself forwarded but that went directly from the defendants to the plaintiff, or was *sent in to the plaintiff for handling, even though there had been no signing on the retrospective agreement, is that correct?*
>
> A. *That is right.*" (Emphasis ours.)

As indicated above, and after appellants clearly knew appellee's position as to the balance due on the earned premium as developed by the final audit, appellee received a summons and complaint from appel-

lants on December 4, 1947, almost a year after the policies had been cancelled, relating to an accident which had involved one of appellants' drivers, a man by the name of Murphy, and had occurred in November, 1946, but which was not reported to appellee for investigation or for any other purpose until summons was served on appellants over a year later (Plaintiff's Exhibit 9; R. 99, 388-389.) In this connection, the record shows that Mr. Davis, appellants' general auditor who had certified to the correctness of the final audit which was made at the premium rate of $2.20 and without reference to the unsigned retrospective agreement, was himself served with process as an officer of appellants, being assistant secretary thereof as well as general auditor, and he testified that he subsequently appeared as a witness on behalf of appellants at the trial (R. 388-389.) This claim reported by appellants after they knew that appellee was claiming $7,841.99 as a premium balance due on the very policies which they were asking appellee to act under, involved a personal injury action claiming damages totaling $25,000.00 which appellee, upon receiving the summons and complaint, thereafter in good faith successfully defended (Plaintiff's Exhibit 20; R. 390) at a total defense expense to plaintiff of $1,671.77, getting what is called "a defendant's result" (R. 99, 390.) This, despite the fact that on October 22, 1947, appellants had knowingly and unequivocally declined any responsibility for the balance due appellee on the earned premiums developed by the final audit. In this connection Mr. Davis, assistant

secretary and general auditor of appellants, testified (R. 388):

"Q. Well, there is a notation by the F. & C. showing the date of accident, November 19, 1946, and reported to the company on December 4, 1947, over a year afterwards.

A. Well, as I say, I don't recall. I was probably served the papers in this matter. I do recall the case very well. We were, as the case developed, we were improperly made a party to that suit and it wound up by us being declared nonsuit against the company.

Q. *Well, when you got the papers, you referred them to the F. & C. for defense, did you not?*

A. *That is correct.*

Q. *And the F. & C. defended you, did they not?*

A. *Yes, that is correct.*

Q. *Through their lawyers?*

A. *Yes.*" (Emphasis ours.)

Briefly, and quite apart from the facts relating to the insurance itself, it is appellee's contention that by referring claims to appellee, and particularly the claim embodied in the lawsuit which developed almost a year after the policies were cancelled, appellants affirmed and ratified the acts of their agent, Mr. Cantlen, and are now bound to appellee to pay the balance due on the final premium audit.

ARGUMENT.

The Court below accepted appellee's contention that a valid contract of insurance existed between the parties until the same was cancelled by appellee in accordance with the policy provisions thereof. By accepting all the benefits of the insurance, appellants are charged with the burdens they assumed under the policies and more particularly are obligated to pay appellee the balance of $7,841.99, with interest, due on the full earned premium of $16,973.11 as determined by the final audit. Apart from the foregoing, appellants, after declining to pay appellee the balance due on the earned premium as determined by final audit and with full knowledge of appellee's claim for the same, referred a new lawsuit to appellee to defend under the very policies appellants were disputing. Appellee undertook this defense with success and got a "defendant's result." Thus, in addition to accepting the benefits during the life of the policies, appellants, after cancellation thereof and refusal to pay the premium balance, affirmed and ratified their broker's acts.

I.

FINDINGS AND JUDGMENT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Because the error specified is that of insufficiency of the evidence to support certain findings favorable to appellee and because appellants asserted that evidence is lacking to support the judgment in appellee's

favor, appellee has detailed the evidence hereinabove with some care to demonstrate that the findings and judgment are amply supported by more than substantial evidence. Thus, the trial Court actually had no alternative but to rule in appellee's favor (R. 50-54) and thereafter find, among other things, that (R. 55-61):

"Findings of Fact

(1) All of the allegations of plaintiff's complaint are true and correct.

* * * * * *

(9) At all times mentioned in said third party complaint, said third party defendant was the duly appointed and acting, and was acting as agent and broker for the placing and maintenance of casualty insurance, including comprehensive, public liability and property damage insurance, for and on behalf of defendants and third party plaintiffs.

* * * * * *

(11) On or about September 1, 1946, at the request of defendants and third party plaintiffs, and each of them, in San Francisco, California, plaintiff made, executed and issued to said defendants and third party plaintiffs its written contract of primary casualty insurance known as 'Comprehensive General — Automobile,' Policy No. SPL 20968, which said policy was filed with the Railroad Commission of California, Transportation Department, Truck and Stage Division, wherein and whereby plaintiff insured defendants and third party plaintiffs, and each of them, for one year * * * at the premium rate of $2.00 per $100.00 of gross earnings of each of said

defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

(12) Also at the request of said defendants and third party plaintiffs, and each of them, plaintiff then and there made, executed and issued to said defendants and third party plaintiffs its written contract of casualty insurance known as 'Comprehensive General — Automobile,' Policy No. SPL 20950, which said policy was issued solely as excess insurance over the primary insurance provided for in said Policy No. SPL 20968, insuring said defendants and third party plaintiffs, and each of them, for one year * * * at the premium rate of $.20 per $100.00 of gross earnings of each of said defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at the end of said policy period.

(13) Thereafter plaintiff delivered said policies to third party defendant, the agent of defendants and third party plaintiffs, and each of them, following which said defendants and third party plaintiffs reported claims and lawsuits under said policies to plaintiff, and pursuant to voluntary audit each month of said defendants and third party plaintiffs, said defendants and third party plaintiffs remitted monthly premium payments to plaintiff, said payments being received by plaintiff on account of the total earned premium and subject to final audit by plaintiff at said rates at the end of said period of said policies.

(14) On or about December 19, 1946, plaintiff, pursuant to the terms of said policies, caused written notices of cancellation of said policies to be mailed to defendants and third party plaintiffs, and each of them, at the address shown on said policies, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947.

* * * * * *

(16) Subsequent to said cancellation, and as soon as possible thereafter, plaintiff caused the total earned premiums on said policies for the period from September 1, 1946, to January 21, 1947, to be computed by final audit at said rates totaling $2.20 per $100.00 of gross earnings of defendants and third party plaintiffs, said premiums so computed being in the total sum of $16,973.12, leaving an unpaid balance of said total earned premiums in the sum of $7,841.99 due plaintiff from defendants and third party plaintiffs, and each of them.

(17) On October 27, 1949, plaintiff made demand on defendants and third party plaintiffs, and each of them, for said unpaid balance, and no part of said unpaid balance of said total earned premiums has been paid by said defendants and third party plaintiffs."

No other findings were proposed by appellants! No conclusions of law different than those reached by the Court below were urged! There was no motion for new trial! Why? Because after four days trial and the consideration of lengthy oral argument and briefs, the filing of which delayed submitting the case to the

trial Court for weeks, appellants knew there were no other proper findings that could be proposed in an attempt to urge the Court to arrive at different conclusions than those reached. A new trial on any grounds was out of the question where, on a record of compelling evidence, such as we have here, only insufficiency of the evidence is now specified on appeal as error.

Appellants concede that the "judgment will not be disturbed if supported by substantial evidence." (A. O.B., 11.) Thus, since the findings are amply supported by substantial evidence, with all conflicts resolved in favor of appellee, the judgment must be affirmed (*Dynamic Air Eng. v. Western D. & M. Corp.*, 101 A.C.A. 881, 882; *Security-First Nat. Bank v. Walters,* 101 A.C.A. 883, 887.) As was said in *Richter v. Walker,* 36 A.C. 597, at page 603:

> "And, of course, as to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible."

II.

SINCE POLICIES WERE IN EFFECT ENTITLING APPELLEE TO THE PREMIUMS CLAIMED, THE BINDER HAS NOTHING TO DO WITH APPELLEE'S CLAIM.

Appellants' main contention is that the two policies in question never became effective. Yet appel-

lants concede they "were covered by insurance" issued by appellee. (A.O.B., 9.) The question then arose as to what insurance it could be if it wasn't that evidenced by the new policies 20950 and 20968 (Plaintiff's Exhibits 3 and 4; R. 88-89). Appellants attempted to answer this by asserting that their own agent told them "that the binder would constitute coverage pending negotiations for renewal at the rate of the expiring policy" and thus the insurance was being carried under the binder with negotiations pending right up until appellee cancelled out. Thus, argued appellants, the premium rate was 1.223, as set forth in the old policy which expired on September 1, 1946, rather than 2.20 as set forth in the new policies 20950 and 20968 which were *issued* after September 1, 1946. Appellants' views are not in accord with the facts prior to the controversy arising between the parties.

In a word, the record does not bear appellants out. Mr. Coughlan, a man of forty years experience in the "mover transport business" (R. 400) and the man who, as president of appellants, personally made the decisions as to all the insurance problems of appellants (R. 346, 400), testified (R. 346-347):

> "Q. You will recall you testified that Mr. Cantlen, around August 27th, delivered to you a binder, copy of which I now hand you, Defendants' Exhibit B, your own exhibit. Do you recall that testimony on your part?
>
> A. Yes, I do. He handed me this, together with a letter.

Q. That is correct. At that time, *did you read this document* which you now have in your hand —copy of which you now have in your hand?

A. *No, sir.*

Q. You had been handling insurance for a long period of time?

A. Yes, sir.

Q. *Do you know what a binder is?*

A. Well, I do and I don't, I suppose.

Q. In any event, you did not read that document which you have in your hand?

A. I did not, but *I do know a binder gives you coverage until a policy is issued.*" (Emphasis ours.)

The binder (Defendants' Exhibit B; R. 106) which Mr. Coughlan admits he didn't read contains the same thought expressed substantially in the same language used by Mr. Coughlan and emphasized above, in that the binder provided that for a period of sixty days appellee binds insurance pending renewal, but that "the policy *issued* shall supersede this binder." It is undisputed that this was the understanding of the parties who at the same time knew that the new policies (Plaintiff's Exhibits 3 and 4; R. 88-89) *when issued* actually replaced the binder for a term of one year from and after September 1, 1946. Thus, Mr. Mettalia, Casualty Superintendent for appellee, testified (R. 87-88, 91):

"Q. What if anything did you do after you received the Bureau approval?

A. We proceeded with the issuance of the policies.

* * * * * *

Q. Now, Mr. Mettalia, as to Plaintiff's Exhibits 3 and 4, the policies in question, there appears on the face of each that the policy period is from September 1, 1946 to September 1, 1947. Can you state whether or not there was any different policy period than that appearing on the face of these contracts?

A. No, there wasn't.

Q. Are you referring to the beginning of the period of the end of the period?

A. Both. I mean, the policy was effective September 1, 1946, and expired September 1, 1947."

On this same subject, Mr. Cantlen, appellants' agent, testified (R. 244, 266):

"Q. When you say the declaration of the policies, what do you mean by that? I mean, that is a little unusual phrase.

A. Well, in the business, you might carry the business under a binder, and the declaration of the policy is declared on writing of the actual contracts.

Q. The writing of the actual contract is in the paragraph here where binders is referred to, is that correct, in reference to the *policies being issued, they would supersede the binders?*

A. *That is right.*

* * * * * *

Q. Did you say anything to Mr. Mettalia or Mr. O'Malley, or anyone else connected with the Fidelity pertaining to an extension of time on the binder?

A. No.

Q. Why not?

A. *Because the binder was replaced by policies as issued."* (Emphasis ours.)

Thus, it should be clear that the insurance coverage which appellants admit existed all during the time in question was evidenced by the policies (Plaintiff's Exhibits 3 and 4; R. 88-89) *which were issued to replace the binder.* These policies provide for the 2.20 rate which appellee contends is the rate in suing for the balance due on the premiums. Consequently, by their own admissions, appellants have shown that the binder is no defense to appellee's claim. The Court below, in its opinion, so held (R. 52, 53):

> "I find under the evidence that defendants claim that they thought that the binder covered them until negotiations were completed is not supported by the evidence. Their chief official had the binder delivered to him. He says he did not read it. This binder provided that it would expire in sixty days and that when the policies were issued they would supersede the binder. This is so explicit in the binder that it is impossible for me to find that defendants could have believed that the binder was in effect after the sixty-day period.
>
> * * * * * * *
>
> These and other facts and circumstances brought out by the evidence support the conclusion that the defendants knew, or should have known that the binder expired at the end of sixty days; that the policies had been issued, delivered, and were effective; that they had superseded the binder; and that the rates provided for by them were controlling until a retrospective agreement was signed, or the policies were cancelled."

III.

THE RETROSPECTIVE AGREEMENT HAS NOTHING TO DO WITH APPELLEE'S CLAIM.

Appellants assert that "the policies were only offered in conjunction with the retrospective agreement" and thus were only to become effective if such retrospective agreement was signed by appellants. (A.O.B. 12-25.) Again, another contention of appellants does not find support in the record. Mr. Mettalia testified (R. 107, 118-119):

> "Q. (by Mr. Eisner). Now, Mr. Mettalia, you presented this retrospective agreement and the two policies to Mr. Cantlen at one time, did you not?
>
> A. I believe so.
>
> Q. And you requested that the insured sign this retrospective agreement as a condition to the policies becoming effective, did you not?
>
> A. *No, absolutely not.*
>
> * * * * * * *
>
> Q. Now, do you mean to say, then, that these policies were in effect without the signing of this retrospective agreement?
>
> A. *Absolutely, yes, sir.*
>
> Q. Did you so tell Mr. Cantlen?
>
> A. Yes.
>
> Q. Did Mr. Cantlen accept these policies without the signing or execution of the retrospective agreement?
>
> A. *Not only did Mr. Cantlen accept them, but the insured accepted them.*
>
> Q. Why do you say the insured accepted them?
>
> A. Because there is an ICC and Railroad Commission filing. If he didn't accept them, he

couldn't operate and the ICC and Railroad Commission would have immediately pulled him off the road." (Emphasis ours.)

On this same subject, Mr. Cantlen testified (R. 252-253, 272, 293-294):

"Q. Now, Mr. Cantlen, after you received the policies from the Fidelity and Casualty people, did you show them to Mr. Coughlin?

A. No.

Q. At the time you had this discussion with him early in October, as you stated, concerning the company wanting the policies to be declared, you had them in your possession then?

A. They were in my office.

Q. You didn't take them over to Mr. Coughlin, though?

A. No.

Q. *Did you tell him you had them in your office?*

A. *I believe so.*

* * * * * * *

Q. Are you sure that you even told Mr. Coughlin that any policies had been received by you from Fidelity?

A. *Yes, I am quite sure.*

* * * * * * *

Q. So that you, at that time, knew something concerning the increase in rates that they were contemplating?

A. *I felt there would be an increase.*

Q. *You stated that to Mr. Coughlin, did you not?*

A. *Yes.*

Q. So that, although the exact amount of 2.20 was never mentioned, there was conversation about a rate increase?

A. Correct.

Q. Did you want to look at this? I interrupted you. This is Plaintiff's Exhibit 1, regarding the rate.

A. I don't see that this has any bearing.

Q. When you got the policies, Plaintiff's Exhibits 3 and 4, 20968 and 20950, *did you look through them at all, read them over, examine them?*

A. *Oh, yes.*

Q. Did you look at the portion of them that sets up the rate for the particular policy?

A. Yes.

Q. *Did you notice that for Policy No. 20968,* which is Plaintiff's Exhibit 3, there was set forth therein on Endorsement No. 7 that *the rate per hundred dollars of gross earnings was $2.00,* final rate to be determined by audit?

A. *Yes.*

Q. This policy was in your possession, I think you said, the latter part of December, 1946?

A. That is right.

Q. *Did you also notice a similar endorsement in No. 20968 where the rate was to be twenty cents for the excess——*

A. *Yes.*'' (Emphasis ours.)

In view of the foregoing, appellee urges that the unexecuted retrospective agreement can be of no evidentiary value in this lawsuit since it never bound the parties and clearly, whether executed or not, was not intended as a condition to the effectiveness of the insurance which appellants concede covered them for all purposes. These purposes included specific refer-

ences made to the two new policies in the filings with the I.C.C. and the Railroad Commission as well as in the insurance certificates issued to their customers. Also ninety-eight claims were settled by appellee paying out a total sum of $7800 under the provisions of the two policies in question. The Court below so held (R. 50-51):

> "There is no doubt that the policies were made out and delivered to the agent of the insured within the sixty-day period provided in the binder. There is no doubt that the plaintiff considered them in effect. This is shown not only by the testimony of its officials, but by the fact that it did not cancel the filings with the Railroad Commission of California and the Interstate Commerce Commission, and that it defended claims made against the defendants. In short it treated and intended the issuance and delivery of its insurance policies to defendants as effective and binding upon it, even though it had not secured from defendants the retrospective agreement which it was demanding.
>
> While the defendants' agent Cantlen testified at one time that he did not regard the transaction as complete until the retrospective agreement was signed, he also testified that he considered his principal covered by these policies, and his conduct shows that he thought that such was the situation."

IV.

VOLUNTARY AUDITS AND DEPOSIT PREMIUMS HAVE NOTHING TO DO WITH APPELLEE'S CLAIM.

Appellants assert that appellee's conduct, in accepting lower premium payments voluntarily made by appellants on their monthly reports (which were subject to final audit) together with appellee's lack of action to force collection of the delinquent deposit premiums (which were not in default until after appellee sent cancellation notices to appellant in December of 1946), is evidence that appellants are not now obligated to pay appellee the final audit premium balance plus interest and costs. Appellants say there has been a waiver and estoppel by appellee.

Admittedly, appellants were covered by insurance, so inaction as to delinquent deposit premiums not yet in default is of no consequence. Also, the Court found that the policies in question had been issued to supersede the binder and thus provide insurance from and after September 1, 1946. So the policies alone determine the 2.20 rate which was used in connection with the final audit in computing the amount on which the premium balance rests. Thus, appellee's conduct as to the lesser voluntary premium payments prior to final audit and the delinquent deposit premiums prior to default, is beside the point. Even more remote, as far as appellee is concerned, are contentions made by appellants as to the misconduct of their broker, Mr. Cantlen, or the self-serving statements of their president, Mr. Coughlin. The trial Court dismissed this issue with the terse comment (R. 51):

"The fact that no deposit premium was paid and that plaintiff received premiums based upon the old rates are not, under the circumstances, inconsistent with the fact that these policies were then in effect."

V.

APPELLANTS' BROKER, AS THEIR AGENT, BOUND APPELLANTS.

Section 33 of the California Insurance Code provides that the term "insurance broker" means one who for compensation and on behalf of another transacts insurance with, but not on behalf of, an insurer. In other words, Mr. Cantlen, the broker in this case, transacted insurance with appellee on behalf of appellants and not on behalf of appellee.

There is no question of ostensible agency where the insurance broker's authority was actual and express. (*K. C. Working C. Co. v. Eureka-Sec. Ins. Co.,* 82 Cal. App. (2d) 120, 129-130.) This was certainly true in this case from 1930 on and particularly as to all insurance policies issued by appellee prior to September 1, 1946. As to the two new policies issued effective on and after September 1, 1946, appellee had no knowledge of any change in Mr. Cantlen's authority, if, in fact, it had been altered. Even so, and without the insured's knowledge, the insurance broker remains the insured's agent by implication, at least, as where one engaged in the insurance business requests the issuance of a policy from an insurance company on the

representation that he is the agent for the applicant and the company has no reason to believe otherwise. (*Universal Ins. Co. v. Manhattan M. Line,* 82 Cal. App. (2d) 425, 431.) Furthermore, a contract is binding on the parties if executed by an agent of one of the parties, even if the principal did not see it or sign it or know anything further about it. (*Earle Restaurant v. O'Meara,* 160 Fed. (2d) 275, 276.)

There is no doubt that, where the insurance broker acts within the scope of his authority, his acts and his knowledge of the facts constitute the acts and knowledge of the principal because the insurance broker is under a duty to keep his principal informed and it is presumed that his principal is so informed and knows all that the insurance broker knows concerning the insurance in question; it is no defense for the principal to contend that the insurance broker did not inform his principal fully as to the facts. Thus in *Shapiro v. Equitable Life Assur. Soc.,* 76 Cal. App. (2d) 75, the Court said at page 87:

> "It was the duty of the agent to communicate to his principal all knowledge which he had received respecting the subject matter of the agency and the presumption is that he performed that duty. Notice given to or possessed by an agent within the scope of his employment is notice to the principal. (Civ. Code, Sec. 2332; *Shamlian v. Wells,* 197 Cal. 716, 720 (242 P. 483); *Early v. Owens,* 109 Cal. App. 489, 494 (293 P. 136); *Waldeck v. Hedden,* 89 Cal. App. 485, 491 (265 P. 340).) One who acts through an agent will be presumed to know all that the latter learns concerning the

> transaction, whether it is actually communicated to the principal or not. There is no difference in this respect between actual and constructive notice. It is of no avail that the agent failed to communicate to his principal what he had ascertained. (*The Distilled Spirits case* (*Harrington v. United States*), 11 Wall. (78 U.S.) 356, 367 (20 L. Ed. 167, 171).)"

The fact that appellants in this case did not see or obtain physical possession of the policies of insurance from Mr. Cantlen, their agent and broker, until October 22, 1947, is of no importance to appellee's claim since the policies were accessible to appellants after the policies were issued and delivered by appellee to their insurance broker in September, 1946.

For example, in a suit over a fire insurance policy, the insured, one Van Meter, didn't know the policy on its face covered logging equipment only while in Washington. The insured had been told otherwise by his agent. The policy when issued was turned over to the finance company which had loaned money on the equipment. The insured never saw the policy. The equipment was moved to California where it was destroyed by fire. The claim was not covered. A reading of the policy would have disclosed the limiting provision. In *Van Meter v. Franklin Fire Ins. Co.*, 164 Fed. (2d) 325, this Court said at page 327:

> "The fact that appellant, Van Meter, did not see the policy prior to the loss does not aid him. The policy was held by the finance companies, but this

did not negative his right to inspect it; secondly, these companies held their right to the policy through Van Meter and at his instance. The fact that all failed to notice a provision, which would readily be seen, and take exception thereto does not prevent the operation of the provision."

The insured is also bound where the insurance company intended to deliver the policy to the insured by placing it in the control of the insured's broker who was acting for the insured. (*N. Y. Life Ins. Co. v. Smith,* 91 So. 456, 458.)

In the leading California case of *Solomon v. Federal Ins. Co.,* 176 Cal. 133, it is clearly held that the insured is fully responsible for the broker's acts as his agent. In this connection the Court said at pages 138 and 139:

"It is well settled that where, in circumstances such as are presented here, an insurance agent requests insurance from a company which he does not represent, he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker. (Citing authorities.) The law in this state goes further and holds the insured responsible for misrepresentations in the applications when it is drawn by a regular soliciting agent of the insurance company where, as in the policy here, such an agent has no authority to waive the provision contained therein that the policy is to be avoided if any misrepresentation has been made concerning a material fact."

The insured was bound to pay the premium where the broker acted, even though fraudulently, the Court in *Eagle Star & British Dominions v. Tadlock,* 22 F. Supp. 545, saying at page 548:

> "An insurance broker is the agent of the insured and not of the insurer. The insured is bound by the broker's acts and is charged with his knowledge. He cannot challenge the validity of the contract which the broker makes for him. He may even be bound by his fraudulent acts or representations."

The *Tadlock* case cites, as one of the authorities for the above quotation, the case of *Strangio v. Consolidated Indemnity & Ins. Co.,* 66 Fed. (2d) 330, where the law of California is stated by this Court as follows on pages 335-336:

> "And, being a broker, he was, under the general law, the agent, not of the insurance company, but of the insured.
>
> "In 32 C. J. 1054, the rule is thus stated:
>
> " 'An insurance broker, like other brokers, is primarily the agent of the person who first employs him, and therefore, an insurance broker or agent employed to procure insurance for another, ordinarily is not the agent of the company, and owes no duty to it; but is the agent of the insured as to all matters within the scope of his employment, and acts or knowledge of such broker or agent will be binding on or imputed to insured and not to the company. In the absence of statute such broker or agent is the agent of insured, even though he solicits

the insurance, or the policy is delivered to him, and he collects the premium as agent of the company; and even though he receives his compensation from the company or its agent.'

"Similarly, in 22 Cyc. 1427, it is said: 'An insurance broker is ordinarily the agent of the person seeking insurance.'

"Again, in Cooley's Briefs on Insurance (2d Ed.) vol. 5, pp. 4065, 4066, we find the following language: 'Generally, the question as to whether a person through whose aid a policy is procured is the agent of the insurer or the insured is raised with reference to insurance brokers. By the weight of authority, a broker who merely solicits applications and afterwards places the insurance with such companies as he can induce to take the risk, is regarded as the agent of the insured, and hence the insurer is not charged with knowledge of matters contrary to the provisions of the policy of which the broker has notice, but which he does not communicate to the insurer or its authorized agent.' "

Failure to pay the deposit premium or sign the proposed retrospective agreement is of no importance insofar as the binding effect of the insurance is concerned, because, Mr. Cantlen, the broker, was acting under instructions to keep appellants insured and, in accordance with such instructions, caused appellee to issue insurance. So delivery of the policies to appellants' broker made appellants liable to pay the earned premium—developed by the final audit—from and after the date the risk attached.

Thus, where the insured asked a broker to procure insurance and subsequently the broker did place the insurance where the policy called for a deposit premium which the insured failed to pay, the failure to pay the deposit premium was immaterial because liability on the part of the insured to pay the earned premium to the insurer attached as of the date the risk attached. Failure to sign the proposed retrospective agreement as to the final audit premium would also appear to be immaterial where the conduct of the parties claim-wise showed each believed the insurance was in force as written until cancelled. Consequently, in *Tarleton v. De Veuve,* 113 Fed. (2d) 290, this Court said at pages 296 and 297:

> "The decisions in California support this holding. 'The most conclusive evidence that the policy had been delivered, that credit had been extended Hill, and that the policy was in full force and effect up to March 14, 1934, is the determined effort of the company to collect the earned premium up to that date * * *. This is an admission on its part that the policy had been delivered, for without its delivery no part of the premium could have been earned. It is also an admission that credit had been extended to Hill at least to March 14, 1934. It is also an admission that the policy was in full force and effect up to that date.
>
> 'It seems too clear for argument that Hill believed he was insured and that the company believed that it was his insurance carrier up to at least March 14, 1934. It seems to us that

the parties to the insurance contract by their conduct have placed a practical interpretation on the questions of delivery and extension of credit that must be construed as binding on the commission and on this Court. (Cases cited.)' "

Again in *Detroit T. Co. v. Transcontinental Ins. Co.*, 105 Cal. App. 395, the Court said at pages 399 and 400:

"*The controversy between the plaintiff and its agent respecting the rate of insurance had nothing to do with the validity of the policy.* The payment of the premium and the retaining of the policy by Marsh & McLennan after their fruitless effort to adjust the rate with the defendant is a circumstance strongly tending to show their agency for the plaintiff. Regardless of their relationship toward other insurance companies, there is ample evidence to support the finding that in this particular transaction Marsh & McLennan acted as the agents of the plaintiff. Mr. Hill, who was manager of the milling company, testified: 'Marsh & McLennan had full charge of all of the insurance for the Hutchinson Lumber Company * * * Under more general instructions as to the extent of the lines to be carried, they were charged with all of the details of seeing that we were kept covered and seeing that we maintained conditions at the plant that we were required to maintain under the policies and seeing that our rates were kept low and in general serving us in the capacity of insurance agents—brokers—and managers to whom we instrusted all of our insurance affairs.' " (Emphasis ours.)

The facts in the case at bar clearly show that for many years appellants' broker, Mr. Cantlen, had been charged with the duty of keeping them insured with appellee, that he had handled all discussions with appellee, that at his request appellee had renewed the insurance each year and had filed insurance coverage for appellants with the Railroad Commission and I. C. C., that all documents relating thereto, such as binders, policies, bills, notices, audit statements, reports and correspondence, had passed between appellee and appellants' broker for appellants' benefit, that the parties knew of the unfavorable loss experience of appellants over the years and the need for an increase in rate, that appellants had all the benefits of the insurance from September 1, 1946, to date of cancellation, including filings with the Railroad Commission and I. C. C., certificate of insurance on business deals and also full claim protection, all at substantial cost and expense to appellee, that the parties treated the insurance as effective until cancelled, and that the rate during the period of insurance as shown by the policies was $2.20 per $100.00 of appellants' gross earnings. Therefore, appellee contends appellants' broker, as their agent, bound appellants to appellee to pay the balance of $7,841.99 due appellee on the earned premium developed in the final audit at the rate stated in the policies. Speaking of Mr. Cantlen's binding acts, the Court said in its opinion (R. 51):

> "He received a claim against the defendants shortly after the delivery of these policies to him,

and sent it to the plaintiff for defense with a covering memorandum referring to these policies by their numbers. A short time later, in November, 1946, he advised the American Manganese Company, a customer of the plaintiff, by letter to the effect that defendants were covered by insurance up to September 1, 1947, which was the expiration date of these policies. He sent a copy of this letter to the defendants. He sent to plaintiff voluntary audits with specific reference to these policies. It will serve no purpose to review every item of evidence indicating that both plaintiff and defendants' agent Cantlen considered that these policies were in effect and superseded the binder. It will suffice to say that they compel the conclusion that these policies became effective even though the retrospective agreement was not executed. Accordingly I so find, and therefore find that the plaintiff is entitled to recover from defendants the amount of its claim, $7841.99, together with legal interest thereon from October 22nd, 1947."

VI.

APPELLANTS ARE BOUND TO APPELLEE BY ACCEPTING THE INSURANCE BENEFITS.

Where an insured accepts and retains the benefits of policies calling for a greater premium than that which the insured believed he had contracted to pay through his agent, the insured, by acts consistent with insurance coverage, ratifies his agent's acts and becomes bound to the insurance company to pay the

greater premium even though the agent may have acted without full authority in procuring issuance of the insurance and accepting the policies thereafter. Thus, by submitting loss claims during the life of the policy, the insured ratifies the procuring of the insurance by the agent and is bound to pay the premium called for by the policies to the insurance company (2 Couch on Insurance, 1364-1366). Our California Supreme Court has recently again recognized the age old rule that "it is axiomatic that the defendant may not accept the benefits and avoid the obligations imposed by the understanding and agreements to which it was a party. To permit that result would be to condone a fraud upon the plaintiff" (*Simmons v. California Institute of Technology,* 194 *Pac.* (2d) 521, 527).

Where, upon application, the insurance company issues a policy binding itself to reimburse the insured for any loss as covered by the policy, the insurance company is entitled to collect premiums stated in the policy for the risk assumed by insurance issued. Thus in the recent case of *Tri-State Casualty Ins. Co. v. Stekoll* (1949) 208 Pac. (2d) 545, the Supreme Court of Oklahoma said at page 550:

> "The plaintiff applied for and secured the contract covering his Kansas operations for his own benefit, in order to be reimbursed and thus suffer no loss for any injuries his employees in Kansas might receive. Defendant contracted to indemnify plaintiff against such losses, in consideration of a premium, which the parties agreed

should be calculated upon the combined payrolls of plaintiff's operations in both states. Having unequivocally bound itself to reimburse plaintiff for any loss arising under the terms of the endorsement, it *is clear that defendant did contract to accept such risk, was bound by its contract in this respect,* and *therefore was entitled to charge and collect premiums for the risk so assumed.*" (Emphasis ours.)

The company is entitled to collect the earned premium where the risk attaches thus making the insured liable for the payment thereof (14 Cal. Juris. 474). It is clear that appellee was bound on its insurance covering appellants and further that appellants treated the contract in that manner by accepting all the insurance benefits the policies could give. It would be a fraud on appellee to permit appellants to avoid the full premium obligations the policies called for. Thus appellants are bound to appellee by accepting the insurance benefits. The trial Court pointed this up when it stated (R. 53):

"Coughlin, the defendants' chief executive, was very experienced in this line of business, and he knew that these defendants could not operate unless they had insurance, and therefore must have inquired and known that these policies had been issued. As heretofore stated, a copy of Cantlen's letter to the American Manganese Company was sent by him to defendants in November, 1946, which clearly showed that the policies were in force. Defendants required plaintiff to defend claims made against them for accidents occurring up to the effective cancella-

tion date, even though some of these claims were not filed until after the defendants had in April, 1947 rejected plaintiff's claim for premiums figured upon the rates fixed by the policies."

VII.

APPELLANTS RATIFIED THE BROKER'S ACTS.

Assuming, but not conceding, that the insurance that was issued and in effect from September 1, 1946, to January 21, 1947, could because of lack of knowledge be paid for at the rate of 1.223 per $100.00 of gross earnings as set forth in the expired policy, certainly after cancellation and when appellants obtained full knowledge of all the facts and became completely aware of appellee's insistence that appellee be paid a premium at the rate of $2.20 per $100.00 of gross earnings as set forth in the new policies, then, having possession of that full knowledge and having, with that knowledge, refused appellee's demand to pay the additional earned premium on October 22, 1947, nevertheless, on December 4, 1947, appellants referred a lawsuit to appellee to defend under the very policies the rate of which appellants disputed and appellee accepted the defense. By so doing appellants ratified the acts of their agent and broker in negotiating for, accepting delivery of and retaining the policies in question, thereby obligating appellants to pay the balance due on the earned premium to appellee at the rate of $2.20 per $100.00 of gross earnings. Where the insured con-

tends that the policy was not authorized and yet subsequently the insured acts so as to recognize the validity of the agreement, with full knowledge of the facts, the insured thereby ratifies the acts of its own insurance agent and broker and the policy is binding upon the insured as to all of its terms (Insurance; 44 Corpus Juris Secundum 860). Thus, in *Doerr v. Fandango Lumber Co.,* 31 Cal. App. 318, the Court said at pages 325 and 326:

> "Indeed, the proposition that ratification of a contract, the making of which is unauthorized by one of the principals, may be effectuated by a recognition, howsoever informally, of the agreement and the obligations arising by virtue thereof, is elementary. A familiar and common application of this doctrine is to be found in those cases where an agent, in making a contract for his principal, transcends the scope of his authority as such, and the principal, after the contract has been made, although not at that time legally bound by its terms, does some act recognizing the validity of the agreement—as, for instance, *accepting some of the benefits or assuming some of the burdens thereof.* In such case, quite obviously, *the principal will be deemed from his acquiescence in the contract to have ratified the unauthorized act of his agent, and will be held to its terms and conditions,* notwithstanding that he has not in express language or in a formal manner ratified the contract." (Emphasis ours.)

Since appellee undertook to defend appellants and assumed control of the claim made upon appellants, appellants were benefited by appellee being bound to

pay the full amount of any judgment awarded against appellants, not exceeding its policy limits (*Rogers v. Pacific Coast Casualty Co.,* 33 Cal. App. 70, 73; *Tulare Co. Power Co. v. Pacific S. Co.,* 43 Cal. App. 315; *J. Frank & Co. v. New Amsterdam C. Co.,* 175 Cal. 293). In this case appellee's policy limits were well in excess of the claim being made upon appellants in the lawsuit which appellants referred to appellee on December 4, 1947, to defend after refusing on October 22, 1947, to pay the balance due on the earned premiums demanded of appellants by appellee. By presenting claims, which appellee acted on, appellants were thereafter in no position to repudiate the provisions of the policy calling for the payment of the earned premium (*Smith v. Smith,* 80 Cal. 323).

Where the terms of a contract are in dispute and subsequently, with full knowledge of the facts, the party disputing the same acts in accordance with the terms of the contract, a ratification occurs (*Pacific Vinegar, etc., Works v. Smith,* 145 Cal. 352, 356; *California Nat. Supply Co. v. O'Brien,* 51 Cal. App. 606, 622). Thus, where a broker negotiates a contract of insurance which the insured subsequently claims to have been unauthorized, but which definitely benefits the insured, and then after acquiring full knowledge of all the facts, the insured makes further claim upon the insurance company for the benefits of the policy, the insured ratifies the act of the broker and is bound by the provisions of the policy (*Brown v. Crown Gold Mining Company,* 150 Cal. 376—see note 7 A.L.R. 1447).

Where the insured notifies the insurer of accidents, that is some evidence that the insured believes that the insurer is on the risk. This is particularly true where the insurer has caused filings to be made with the Railroad Commission and the I. C. C., as these filings constitute definite evidence that the insurer believes that it is on the risk until the policy is terminated, or cancelled on a proper notice, and, under such conditions, the insured is liable for the premiums on the policy (*Ohran v. National Automobile Ins. Co.,* 82 Cal. App. (2d) 636, 642, 646). The rule has long been recognized that a person cannot retain the benefits of a contract and insist that he is only bound by the obligations thereof to the extent that he desires to recognize them, particularly where his agent contracted in his behalf. By knowingly claiming the fruits he ratifies the contract and assumes the burdens, the ratification being in the nature of an estoppel (*Patterson v. Crowell,* 15 Cal. App. 105, 108; *Newhall v. Joseph Levy Bag Co.,* 19 Cal. App. 9, 26). In *Gardner v. City of Glendale,* 45 Cal. App. 641, the Court said at page 644:

> "If a principal ratifies any portion of an unauthorized transaction of his agent, he must be deemed to have ratified the whole of it. *A principal may not receive the benefits and at the same time disclaim responsibility for the methods adopted by his agent. The acceptance of the benefits of the transaction by the principal constitutes the ratification of the acts of his agent.* The Supreme Court aptly stated the rule in *Gribble v. Columbus Brewing Co.,* 100 Cal. 67, 71 (34

Pac. 527), as follows: 'And where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter.' " (Emphasis ours.)

VIII.

APPELLEE ENTITLED TO INTEREST.

On October 22, 1947, the day appellants' broker transmitted appellee's demand to appellants, appellants unequivocally advised appellee "it is therefore necessary for us to decline payment of your Invoices" demanding payment of $7,841.99 (Plaintiff's Exhibit 18; R. 257). Appellee has prayed for and been granted interest at 7% per annum from that date. The authorities support that ruling and indicate that even an earlier date, "the due date" may be applicable. In this case the due date was from and after the receipt of the "bills" weeks earlier than October 22, 1947 (Plaintiff's Exhibit 13; R. 158).

In the leading case of *Gray v. Bekins,* 186 Cal. 389, the Court said at page 399:

> "The general rule is that interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation. In actions upon contracts the

> sum due or the means of calculating the sum are usually clearly provided for in the contract and interest is consequently allowable from the time the sum in suit becomes due."

In *Pitzer v. Wedel,* 73 Cal. App. (2d) 86, plaintiff was claiming 7% interest which the Court allowed from the date of demand for payment, the Court saying at pages 92 and 93:

> "Where there is no contract to pay interest, in the absence of statutory provision to the contrary, the law awards interest upon money from the time it becomes due and payable, if such time is certain or can be made certain by calculation. The refusal of the trial Court to allow interest from the date of the original agreement must be affirmed."

To the same effect are:

Perry v. Magneson, 207 Cal. 617, 622;
Yule v. Miller, 80 Cal. App. 609, 617.

The payment of interest, as prayed for, is in the nature of damages for the retention of the liquidated balance rightfully due appellee on the earned premium as determined by final audit (California Civil Code, 3287, 3302; *Hood v. Smith,* 39 Southeastern (2d) 604; Restatement of Law of Contracts, Sec. 337(a)). Despite the earlier "due date," appellee is satisfied with interest as granted from October 22, 1947.

CONCLUSION.

In this suit on contract based on two insurance policies, appellee is entitled to judgment for a final audit premium balance of $7,841.99, due appellee on such policies, together with interest at the rate of 7% per annum from at least October 22, 1947, the date when appellants definitely declined appellee's demand for the payment of the same. Accordingly, the judgment below, being supported by substantial evidence, must be affirmed.

Dated, San Francisco, California,
February 28, 1951.

Respectfully submitted,
HADSELL, MURMAN & BISHOP,
SYDNEY P. MURMAN,
Attorneys for Appellee The Fidelity and Casualty Company of New York.